STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 1999
v	No. 203814 Recorder's Court
GILBERT ROBINSON, III, Defendant-Appellant.	LC No. 96-7475-01

Before: White, P.J., Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his April 10, 1997, jury conviction of second degree murder, MCL 750.317; MSA 28.549, and first degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b).[1] Defendant has raised three claims on appeal. The first issue, raised by defense counsel, challenges the trial court's denial of defendant's motion to suppress his custodial statement. Next, defendant asserts, in propria persona, that he was denied the effective assistance of counsel because defense counsel failed to obtain an expert witness in DNA science. Finally, defendant asserts, again in propria persona, that the trial court erred in admitting evidence of serological electrophoretic analysis. We affirm.

On July 13, 1996, 79-year-old Myrtle Allen was stabbed to death in the early evening at her home in Detroit. Her body was discovered the same day with ten stab wounds to the chest, two stab wounds to the upper abdomen, and a deep slicing laceration across her throat. After taking statements from neighbors, the police wanted to question defendant concerning the events surrounding Ms. Allen's death.[2]

On July 14, 1996, defendant, accompanied by his mother, went to Detroit Police Headquarters to speak to homicide investigators concerning his whereabouts on the previous day. Upon arriving at police headquarters sometime in the morning, defendant was told to return at around 3:30 p.m. since the investigating officers were not present. When he returned later in the day, defendant was met by Officer Vintevogel. Defendant was read his *Miranda*[3] rights and signed a form indicating he understood those rights. Defendant's only statement to Officer Vintevogel was that he did not have any knowledge concerning the cause of Ms. Allen's death.

At approximately 4:30 p.m. defendant was taken from a locked interrogation room and seated in Lieutenant Ghougoian's office. Lieutenant Ghougoian questioned defendant for approximately two to three hours. Defendant was not readvised of his constitutional rights. Lieutenant Ghougoian telephoned defendant's mother to inform her what was happening. She also asked defendant's mother to ask her son to tell the truth. It was during this interrogation that defendant admitted to being involved in a struggle with the victim after she attacked him with a knife. Defendant claimed that in the process of struggling with the victim, either she stabbed herself or he stabbed her. He claimed not to know how she was wounded so many times or how her throat was lacerated. Lieutenant Ghougoian did not memorialize this interrogation.

At approximately 7:30 p.m. defendant was taken back to an interrogation room where Investigator Smith went over defendant's statement. Defendant was given another constitutional rights acknowledgment form that he read and signed in front of Investigator Smith. At this time defendant's statement was put into written form by Smith. Defendant signed each of the three pages and initialed several paragraphs of the statement. Defendant was given the opportunity to add or correct any portion of the statement that he saw fit, however, he declined to do so.

At the crime scene, the police obtained a blood soaked paper towel or tissue found at the base of the partially ajar back door of the victim's home. Also recovered was a toothpick found near the victim's body. DNA analysis was performed on the bloody towel and compared with blood samples taken from defendant and the victim. The blood found on the towel matched the test samples of both defendant and the victim. Blood found on a curtain at the crime scene matched defendant's blood. The DNA analysis of the saliva on the toothpick likewise matched the DNA of defendant.

During the subsequent *Walker*[4] hearing and jury trial, defendant testified that he did not make a statement/confession to the police. He thought he signed a questionnaire indicating that he would not give a statement and that he wanted to speak to an attorney. Defendant asserted that the police would not let him read the statement/questionnaire, and that he signed it in order to be able to speak to his mother and get something to eat.

Defendant claims the trial court erred in not suppressing his confession. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Sexton, supra*; *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J), 44 (Weaver, J); 551 NW2d 355 (1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givens*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The right to be free from self-incrimination protects an accused from being compelled to testify against himself or provide evidence of a testimonial or communicative nature. *People v Cheatham, supra*, 453 Mich at 9. Compulsion proscribed by the right is that resulting from circumstances in which a person is unable to remain silent because of threats or violence, improper influence, or direct or implied promises, however slight, *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489; 12 L Ed 2d 653

(1964), unless he chooses to speak in the unfettered exercise of his own will, *Id.*; *In re Stricklin*, 148 Mich App 659, 664; 384 NW2d 833 (1986). The prosecutor may not use custodial statements as evidence unless he demonstrates that, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda, supra; People v Cheatham, supra,* 453 Mich at 11 (Boyle, J), 44 (Weaver, J).

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra*; *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). The key question is whether the accused could reasonably believe that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). In the instant case, the record clearly reflects that defendant was in custody and advised of his constitutional rights. This advisement is evidenced by his signature on two constitutional rights acknowledgment forms.

As to whether defendant's written statement was involuntarily made, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *People v Sexton, supra,* 458 Mich at 66; *People v Givans, supra,* 227 Mich App at 121. Coercion can be both physical or psychological, *People v DeLisle*, 183 Mich App 713, 721; 455 NW2d 401 (1990), after remand 202 Mich App 658; 509 NW2d 885 (1993).

This case primarily revolves around what defendant stated in his signed confession and what he later claimed at the *Walker* hearing and his jury trial. The record reflects that on two separate occasions defendant was informed of his constitutional rights and then waived those rights by making a statement to the police. First, he stated that he had nothing to do with Ms. Allen's death. Later he admitted to getting into a struggle with her whereby she was wounded with the knife she allegedly brandished against defendant. The credibility of a witness' testimony is to be determined by the trial court. *People v Cheatham, supra,* 453 Mich at 30.

Defendant's signed confession includes statements that he had freely and voluntarily given the statement, that he was not treated poorly by the police, and that he was not intoxicated or under the influence of any narcotics. Also, defendant is a high school graduate who completed some of his education at a private high school in the Detroit area. Contrary to his signed statement, defendant testified that he was not allowed to read his statement, that he was denied the chance to speak with his mother or eat until he signed the statement, and that he was interrogated without the requested assistance of legal counsel. We are not convinced that the trial court erred in denying suppression of defendant's statement. Our review of the record indicates that defendant's statement was not coerced or involuntarily made. It should be noted that defendant's written statement/confession is primarily exculpatory in nature. An exculpatory statement tends to show the voluntariness of the statement. *People v Johnson*, 65 Mich App 290, 293; 237 NW2d 295 (1975). In his statement defendant

professed to have acted in self-defense when Ms. Allen lunged at him with a knife. Defendant admits to possibly stabbing Ms. Allen once while struggling to disarm her. This statement is in stark contrast to the physical evidence showing Ms. Allen to have been stabbed oven ten times with a severe laceration to her throat spanning from ear to ear. If anything, defendant's statement shows his desire to spread misinformation in an attempt to exonerate himself from a situation showing his ruthless disregard for human life.

Next, defendant claims in propria persona that he was denied the effective assistance of counsel stemming from his attorney's failure to obtain an expert in DNA analysis. We disagree. Defendant failed to move for a new trial or a *Ginther*[5] hearing. Therefore, review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, *supra* at 687. A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866; 460 NW2d 226 (1990). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant's evaluation of counsel's performance is irrelevant. *People v Mitchell*, 454 Mich 145, 151 n 6, 167; 560 NW2d 600 (1997).

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *id.* at 163; *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Hyland, supra*. In the instant case, at the *Walker* hearing defense counsel was permitted by the trial court to employ the use of an expert in DNA analysis in order to presumably counter the prosecution's DNA expert analysis. At trial, a defense expert witness was never presented to testify. This Court has recently held that an indigent defendant is not necessarily entitled to an expert for every scientific procedure. *People v Leonard*, 224 Mich App 569, 581; 569 NW2d 663 (1997), citing *Vickers v Arizona*, 497 US 1033; 110 S Ct 3298; 111 L Ed 2d 806 (1990). A defendant must show a nexus between the facts of the case and the need for an expert. *People v Leonard*, *supra* at 582.

During direct examination of the prosecution's expert witness, a member of the Detroit Police Crime Lab, the expert stated that she always testifies to her results and not for the aid of either party in a trial. From examination of the trial record, it is clear to this Court that defense counsel was very knowledgeable in the use of DNA analysis in criminal investigations and performed a more than adequate cross-examination of this expert witness. As such, we find that defense counsel's performance was not deficient nor that defendant was prejudiced by his counsel's actions so as to

deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Finally, defendant claims, again in propria persona, that the trial court erred in admitting scientific evidence of serological electrophoretic analysis. We disagree. To preserve this issue for appeal, defendant must object to the adequacy of a test's foundation at trial. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). A review of the trial record indicates that defendant did not object to the test's foundation at trial. This matter is not preserved for appellate review. However, review may be granted if failure to consider this issue would result in manifest injustice, such as when a criminal defendant claims he was deprived of a fundamental constitutional right at trial which was decisive to the outcome of the case. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). While we decline to address defendant's non-constitutional claim on appeal, we note that electrophoretic analysis has gained general scientific acceptance and is admissible when adequate safeguards are implemented. See *People v Gistover*, 189 Mich App 44; 472 NW2d 27 (1991).

Affirmed.

/s/ Helene N. White
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] The trial court vacated defendant's second degree murder conviction.

[2] The testimony of people in the neighborhood place defendant at or near the victim's house at the approximate time of death.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).